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In the Supreme Court of the United States

OCTOBER TERM, 1992

RONALD D. GRAF, *Petitioner*,

v.

UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Does due process require that, for peacetime general courts-martial, trial and intermediate appellate judges have the protection of a fixed term of office?

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UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

In the more than eight years since Congress expanded the certiorari jurisdiction, this Court has received over 200 petitions in military cases, and has granted plenary review in only one, *Solorio v. United States*, 483 U.S. 435 (1987). This case should be the second one because it involves a properly presented and preserved constitutional issue relating directly to the integrity of the military justice system and the independence of the military trial and intermediate appellate benches: whether, in peacetime, the absence of any fixed terms of office for the general court-martial trial judges and the intermediate appellate military judges who serve under the Uniform Code of Military Justice ("the Code") violates the due process rights of Americans who serve our Nation.

Opinions Below

The decision of the United States Court of Military Appeals, 35 M.J. 450, is reproduced in the separately-bound

Appendix ("App.") at 1a. The order granting discretionary review, 34 M.J. 169, is at App. 43a. The decision of the United States Navy-Marine Corps Court of Military Review on the issue presented in this petition, 32 M.J. 809, is at App. 44a. Appendices D and E are the order denying reconsideration of that decision, App. 53a, and the Court of Military Review's subsequent unreported decision on the merits. App. 55a.

Jurisdiction

The jurisdiction of this Court is invoked under 10 U.S.C.A. § 867a(a) (West Supp. 1992) and 28 U.S.C. § 1259(3) (1988). The judgment of the Court of Military Appeals was entered on September 30, 1992.

Constitutional and Statutory Provisions

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Pertinent statutory provisions are reproduced in the Addendum.

Statement of the Case

1. *Institutional Framework.* The military judiciary established by Congress under Article I of the Constitution has three levels. At the top are the five judges of the Court of Military Appeals. These are appointed from civilian life by the President with the advice and consent of the Senate. Except for two who were appointed to statutorily-fixed terms of shorter duration when the court was expanded to

its present size, these judges have 15-year terms. UCMJ Art. 142, 10 U.S.C.A. § 942 (West Supp. 1992). Below them are the 36 appellate military judges who serve on the Courts of Military Review. These may be military officers or civilians, and are appointed by the Judge Advocate General of their service. UCMJ Art. 66(a), 10 U.S.C. § 866(a) (1988). They have no fixed term of office. At the lowest rung are the military trial judges, of whom 95 are qualified to preside at general courts-martial. These must be military officers. UCMJ Art. 26(a), 10 U.S.C. § 826(a) (1988). They too are appointed by the Judge Advocate General and have no fixed term. This case concerns only the judges who preside over general courts-martial or serve on the Courts of Military Review.

A general court-martial is the military's felony court. It can try any offense committed by a member of the armed services, *Solorio, supra,* and may adjudge sentences including the death penalty, imprisonment for life or terms of years, total forfeiture of pay and allowances and the lifelong stigma of a dishonorable or bad conduct discharge.

There are four Courts of Military Review, one each for the Army, Air Force and Coast Guard, and one which serves both the Navy and the Marine Corps. These are standing courts which, absent a waiver by the accused, must review all cases in which a death sentence, confinement of one year or more, or a punitive discharge is adjudged. UCMJ Art. 66(b), 10 U.S.C. § 866(b) (1988).

> [A] military judge, whether at the trial level or on the bench of a Court of Military Review, has no fixed term. He is subject to decertification as a judge or transfer to other duties at the discretion of the Judge Advocate

General of his armed force.[1]

Neither the Uniform Code nor the *Manual for Courts-Martial* specifies a given tenure for a military judge--trial or appellate. Instead, each armed force assigns military judges as it sees fit. In the Army, judges often serve for three- or four-year tours. However, judges may have their judicial assignment terminated at any time.[2]

There appear to be . . . no restrictions at all on denying "reappointment" (*e.g.*, reassignment as a judge) to a military judge whose conduct is considered unsatisfactory. Thus, although neither command channels nor the Judge Advocate General may complain to a judge about findings or sentence, the lack of tenure permits reassignment of the judge for those very reasons. Further, as all assignments are made pursuant to "the needs of the service," it is by no means clear that a judge could not lawfully be reassigned out of the judiciary because of dissatisfaction with his or her results.[3]

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[1] William H. Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 So. Ill. U. L. Rev. 1, 17-18 (footnote omitted); *see also* Robinson O. Everett, *The New Look in Military Justice*, 1973 Duke L.J. 649, 685 (military judge "has no regular term of office").

[2] 1 Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* § 14-31.00, at 518-19 (1991) (footnote omitted).

[3] *Id.* § 14-80.00, at 555.

A 1984 Department of Defense study found that 25% of military trial judges and 24% of Court of Military Review judges were aware of instances in which a military judge was threatened with reassignment or actually reassigned because of his or her decisions.[4]

2. *Petitioner's Trial.* In June, 1989, two related cases were tried by general courts-martial at the Naval Air Station at Pensacola. Both arose from major larcenies at a Navy supply center in New Orleans. The offenses were part of a "sting" conducted by the Naval Investigative Service ("NIS"), in the course of which petitioner and another sailor were led to believe they were dealing indirectly with an Iranian arms merchant. NIS's paid informant fed the men the stock numbers of aircraft parts which were to be stolen. The stock numbers were selected by the Navy and referred to parts that were classified.

The government stipulated that there was no compromise of classified data; no military property ever left government control; the stock numbers for the classified parts were supplied by the government itself; the informant lied when he told petitioner there was an Iranian arms dealer in the picture; and, most importantly, neither the government of Iran nor any other foreign power or citizen was in any way involved. There was never any danger that petitioner's conduct or that of the other accused would actually harm the United States. Still, the Navy insisted on treating both cases as "national security cases." Petitioner was charged with espionage, attempted espionage, conspiracy to commit espionage, violation of service regulations concerning classified information, false official statements,

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[4] 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory Commission Report* 365 (1984) (table 1). If anything, these data understate the Navy and Marine Corps reality since the integrity of the survey was compromised in a way that "may have biased the data by causing respondents to provide answers that conformed to their expectations of what Navy JAG authorities wanted to hear." 2 *id.* 1374.

selling military property, larceny, housebreaking, destruction of a public record and possession and use of marijuana.

Petitioner's trial was presided over by a Navy commander who acknowledged that he lacked a fixed term as a military judge. App. 7a. On *voir dire*, this judge confirmed that he served in his judicial capacity pursuant to orders issued by the Chief of Naval Personnel and that nothing prevented him from receiving orders which would shorten or lengthen his tour of duty as a judge. App. 6a-7a. The defense challenged him for cause, arguing that "in a felony case such as this the trial judge should have a fixed term of office as a matter of due process." App. 9a. The judge denied the challenge, App. 10a, and the trial proceeded.

Petitioner pleaded guilty to many of the charges pursuant to a pretrial agreement. After a hearing, the members of the court-martial sentenced him to be confined for five years, to forfeit all pay and allowances, to pay a fine of $100, and to be dishonorably discharged. In accordance with the pretrial agreement, the officer who convened the court-martial mitigated the dishonorable discharge to a bad-conduct discharge, mitigated the fine to forfeitures, and suspended execution of forfeitures in excess of $450 pay per month for three years. With time off for good behavior, petitioner was released from confinement in November 1992.

3. *Proceedings in the Court of Military Review*. In the Court of Military Review, petitioner contested the military judge's ruling on the challenge based on his lack of a fixed term, and moved to disqualify the military appellate judges in light of their own lack of fixed terms. Relying on *Palmore v. United States*, 411 U.S. 389 (1973), the court rejected his arguments. App. 46a. It also based its opinion on the notion that petitioner had been unable to show actual prejudice from the structural defect to which he had

objected. App. 47a, 49a.[5] In a later ruling, it rejected petitioner's remaining assignments of error (concerning command influence, instructional errors by the military judge, sentence appropriateness and improper action by the officer who convened the court-martial) and affirmed. App. 55a-62a.

4. *Proceedings in the Court of Military Appeals.* On discretionary review, App. 43a, the Court of Military Appeals affirmed. "[I]n the absence of more particular guidance" from this Court, it held that the standard for due process issues arising under the Code is the same as that applied to state criminal proceedings under *Medina v. California*, 112 S.Ct. 2572 (1992). App. 29a.[6] Based on the fact that British military justice "has never had professional military or civilian judges presiding at its courts-martial and the United States only recently created such an official in 1968," it concluded that "the historical maintenance of such diverse systems of justice for almost 300 years suggests the absence of a fundamental fairness problem." App. 33a-34a. Its ultimate holding was that "[i]n view of other guarantees of independence provided for military judges in the [Code] . . . court-martial judges can independently and fairly perform their duties without [the]

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[5] This aspect of the decision was contrary to *Arizona v. Fulminante*, 111 S.Ct. 1246, 1265 (1991), which reaffirmed the rule that prejudice need not be shown where a structural defect in the tribunal is at issue. On subsequent review, the Court of Military Appeals did not rest its decision on the absence of a showing of prejudice.

[6] The decision incorrectly suggests that petitioner conceded the applicability of *Medina*. App. 30a. *Medina* was decided after this case was briefed and argued. When the government called *Medina* to the court's attention, petitioner responded that it was doubtful that the case applies to the analysis of Fifth Amendment due process issues, but that the lack of fixed terms does not withstand review under either *Medina* or *Mathews v. Eldridge*, 424 U.S. 319 (1976), on which petitioner had relied.

protection of a fixed term of office." App. 34a. While recognizing that neither *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), nor *Palmore* "expressly approve a judicial system of a judiciary without a fixed term of office," the court opined that "their silence in approving judgments from such a system is deafening." App. 35a. It refused to follow the holding of the Supreme Court of Canada in *R. v. Généreux*, [1992] 1 S.C.R. 259, 70 C.C.C.3d 1 (1992), App. 63a, that judicial independence in courts-martial requires fixed terms. *Id.* at 301-05, App. 101a-06a.

Reasons for Granting the Writ

I

THE DECISION OF THE COURT OF MILITARY APPEALS RAISES AN IMPORTANT CONSTITUTIONAL ISSUE THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

This case raises, in the context of the military justice system, one of the most fundamental open issues of constitutional law: whether due process requires that trial and appellate judges in a peacetime felony case have the protection of a fixed term of office. The Court has never squarely addressed either this issue,[7] which affects thou-

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[7] The issue was presented in *United States v. Rivera*, ACM 24487 (A.F.C.M.R.) (per curiam), but the Court of Military Appeals declined to grant review on it, 21 M.J. 286 (C.M.A. 1985) (mem.), and later affirmed without referring to it. 23 M.J. 89. This Court denied certiorari. 479 U.S. 1091 (1987). *Louisiana ex rel. Handlin v. Wickliffe*, 79 U.S. (12 Wall.) 173 (1870), involved the removal of a judge in the course of the military occupation of New Orleans; the opinion relies on wartime conditions not present in this case.

The Court of Military Appeals' view that this Court's failure in

sands of courts-martial each year,[8] or the related issue presented by the handful of state judicial systems that even now tolerate at-will judges in their lowest tier of local police courts, which have no felony jurisdiction.[9] *We know of no state in which felony cases are tried or felony appeals are heard by at-will judges.*

The case does not test the constitutionality of any requirement of the Code or the *Manual for Courts-Martial*. Rather, as the Court of Military Appeals recognized, App. 26a, it tests the constitutionality of a mere agency practice. That practice is followed by each of the armed services, and

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Toth and *Palmore* to disapprove the military's at-will arrangements for judges represents a "deafening" silence, App. 35a, is unfounded. *Toth* was decided long before enactment of the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, which created the military bench. It regarded the absence of terms of office for the "law officers" who at the time presided at general courts-martial not as a systemic *strength*, but as a *shortcoming* which militated *against* the exercise of court-martial jurisdiction in the circumstances there presented. *Palmore* rejected a claim that the Fifth Amendment requires *life* tenure for the fixed-term judges of the Superior Court of the District of Columbia. 411 U.S. at 410; *see* D.C. Code § 11-1502 (1981 ed.) (15-year terms). The case did not address the situation where judges have no fixed term at all, and its passing reference to the military justice system, citing *Toth*, cannot be seriously taken as a ruling on the issue.

[8] The armed forces conducted 2,610 general courts-martial during fiscal year 1991. Ann. Rep. on Mil. Just. for Oct. 1, 1990 to Sept. 30, 1991 at 43, 57, 71, 80 (1992). The Courts of Military Review decided 5,183 appeals from general and special courts-martial during the same period. *Id.*

[9] The Court denied review in *People v. Horan*, 556 P.2d 1217 (Colo. 1976) (*en banc*), *cert. denied*, 431 U.S. 966 (1977), and *Summers v. Thompson*, 764 S.W.2d 182 (Tenn.), *app. dismissed*, 488 U.S. 977 (1988). In *Horan*, the petitioner had a right to a trial *de novo* on appeal from a municipal court whose judge served at the pleasure of the city council. In *Summers*, the state supreme court construed the statute at issue to drastically narrow the jurisdiction of the city court.

has been remarked on by observers across the spectrum since the military judiciary was created in 1968.[10] The issue was properly presented at each stage of the case. It has also been raised in a number of other pending or recently-decided military appeals. Given the centralization of military appeals, there is no reasonable prospect of a

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[10] Robert S. Rivkin, *Tailhook Hypocrites*, San Francisco Daily J., Nov. 13, 1992; David A. Schlueter, *Military Criminal Justice: Practice and Procedure* § 8-3(A), at 298 (1992); David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's--A Legal System Looking for Respect*, 133 Mil. L. Rev. 1, 24-25 (1991); J. Wayne Kastl, *"I've Got the Heebie-Jeebies": The Four Toughest Questions in Military Justice*, 38 Fed. B. News & J. 216, 217 (1991); James K. Gardner, *Apples and Oranges: A Comparison of Civilian and Military Trial Courts*, 38 Fed. B. News & J. 192, 199 (1991); Robert S. Rivkin, *Can the Military Dispense Justice?*, San Francisco Daily J., Feb. 8, 1991; 1 Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* § 14-80.00, at 554 (1991) ("if a truly independent judiciary is desired in the armed forces, some form of tenured judiciary may be unavoidable"); Note, *Military Justice and Article III*, 103 Harv. L. Rev. 1909, 1926 n.109 (1991); Eugene R. Fidell, *Military Judges and Military Justice: The Path to Judicial Independence*, 37 Fed. B. News & J. 346, 74 Judicature 14 (1990); Note, *Service-Connection and Drug-Related Offenses: The Military Courts' Ever Expanding Jurisdiction*, 54 Geo. Wash. L. Rev. 118, 123, 125 & nn.56-58 (1985); Eugene R. Fidell, *Judicial Tenure Under the Uniform Code of Military Justice*, 31 Fed. B. News & J. 327 (1984); William H. Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 So. Ill. U. L. Rev. 1, 17-18; Pitkin, *The Military Justice System: An Analysis from the Defendant's Perspective*, 29 JAG J. 251, 257-58 (1977); Charles R. Bruton, *Book Review*, 123 U. Pa. L. Rev. 1482, 1496-97, 1506 (1975); Edward F. Sherman, *Book Review*, 84 Yale L.J. 356, 374 (1974); Joseph W. Bishop, Jr., *Justice Under Fire: A Study of Military Law* 44, 300-01 (1974); Kenneth W. Hodson, *Military Justice: Abolish or Change?*, 22 U. Kans. L. Rev. 31, 53 (1973); Robinson O. Everett, *The New Look in Military Justice*, 1973 Duke L.J. 649, 685; Homer E. Moyer, Jr., *Justice and the Military* § 2-785, at 630 (1972); Edward F. Sherman, *The Civilianization of Military Law*, 22 Me. L. Rev. 3, 48, 57, 103 (1970); Homer E. Moyer, Jr., *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 Me. L. Rev. 105, 139-40 n.259 (1970).

conflict among the circuits.

The need for judicial independence is not in dispute between the parties. The question is whether independence can be achieved without fixed terms. The Court of Military Appeals' holding--that fixed terms are not integral to judicial independence and may be dispensed with because of other alleged protections--misconceives the issue, disregards this Court's precedents in the military area, and reflects the application of the wrong due process standard.

II

THE COURT OF MILITARY APPEALS ERRED BY APPLYING *MEDINA* TO PETITIONER'S FIFTH AMENDMENT DUE PROCESS CLAIM.

Until *Medina v. California*, it was assumed that *Mathews v. Eldridge* governed due process issues under both the Fourteenth and Fifth Amendments, including cases arising under the Code.[11] The Court of Military Appeals refused to evaluate the practice at issue here by applying the three-part test in *Mathews*.[12] Had it done so,

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[11] David A. Schlueter, *Military Criminal Justice: Practice and Procedure, supra*, § 1-1(B), at 6 n.15, *citing Mathews* and *Illinois v. Batchelder*, 463 U.S. 1112, 1117 (1983).

[12] [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would

it would have been compelled to rule in petitioner's favor. Instead, even though *Medina* involved the *Fourteenth* Amendment, the court applied that case to petitioner's *Fifth* Amendment claim. The court committed error by applying *Medina* at all. It compounded that error by misapplying the case.

1. It was error to apply *Medina* at all because that case relies on federalism concerns as the reason for not subjecting state criminal procedures to a more exacting due process standard. 112 S.Ct. at 2576-77. Federalism concerns have no bearing here because Fifth Amendment due process is the source of petitioner's claim. The abandonment of *Mathews* for *Medina* also produces the anomalous result of subjecting due process questions arising under the Code (where death sentences and lengthy prison terms are potentially at issue) to less searching scrutiny than cases involving far less weighty matters, such as the determination of social security benefits. *See* App. 30a. Because the Court of Military Appeals was itself uncertain whether it was correct to rely on *Medina*, App. 30a, and because there is uncertainty elsewhere on which line of cases governs Fifth Amendment due process claims,[13] certiorari should be granted. Due process questions frequently arise within the military justice system. The Court of Military Appeals and the sizable jurisdiction for which it is responsible should not be left in the dark as to which standard should be applied.

2. Certiorari should also be granted to determine whether the analysis of legal tradition in due process cases

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entail. 424 U.S. at 334-35.

[13] *E.g.*, *United States v. Wise*, 976 F.2d 393, 411 n.4 (8th Cir. 1992) (*en banc*) (Arnold, C.J., concurring in part and dissenting in part) ("it seems that *Mathews* is still generally applicable under the Due Process Clause of the Fifth Amendment"), *petition for cert. filed*, 61 U.S.L.W. ___ (U.S. Dec. 15, 1992) (No. 92-6960).

arising under the Code is properly confined to *military* legal tradition or extends to the broader legal traditions of our society. The Court of Military Appeals' narrow focus on military legal history was doubly mistaken. First, that history is largely irrelevant because the offices of military judge and appellate military judge were not even created until 1968.[14] Second, *Medina* contemplates an assessment not of the narrow question of what any particular jurisdiction has deemed fundamental, but of the experience of our legal institutions in general. It was circular for the court below to confine its *Medina* analysis of what legal tradition deems fundamental to the narrow field of military justice. Such a limited focus avoids the very kind of inquiry *Medina* contemplates, just as if a state were allowed to argue that a particular safeguard was not required by Fourteenth Amendment due process because that state had itself never afforded it to criminal defendants.

3. Fixed terms of judicial office reflect "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* at 2577, *quoting Patterson v. New York*, 432 U.S. 197, 202 (1977). They constitute a fundamental protection which helps judges "hold the balance nice, clear, and true" between the accused and the prosecution. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). This is particularly important in the hierarchical world of the military.

a. The connection between judicial independence and protected tenure (life or otherwise) is unquestionably central to Anglo-American legal tradition. In England, it is manifest in the path which leads from Coke's dismissal in 1616, through the achievement of service during good behavior (rather than at the pleasure of the throne) in § 7

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[14] *See* note 7 *supra*. Until then, there were only "law officers" who sat on general courts-martial and the "members" of the services' Boards of Review (now the Courts of Military Review).

of the Act of Settlement, 12 & 13 Will. 3, ch. 2 (1701), to the abrogation in 1760 of the rule that judicial patents had to be reissued upon the death of the monarch.[15] The lack of protected judicial tenure was one of the colonists' grievances against England. The Declaration of Independence recited that George III had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

b. Historic practice of the states is pertinent to what due process requires. *Medina*; *Connecticut v. Doehr*, 111 S.Ct. 2105, 2115-16 (1991). From the beginning, state practice has been hostile to allowing judges to serve at anyone's pleasure.[16] The clear trend from Independence onward was for judges to enjoy either fixed terms or life tenure. *See generally* Haynes, *supra*, at 98-99, 101-35. Today, the virtually unanimous legislative pattern is for state judges to enjoy either life tenure, tenure until a stated retirement age or fixed terms of years.[17] A handful of jurisdictions tolerate trial judges who serve at the pleasure of someone else, but these rarities are entirely distinguishable. They typically involve courts of extremely limited subject matter jurisdiction, whose judgments are reviewable

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[15] *See generally* Theodore F. T. Plucknett, *Taswell-Langmead's English Constitutional History* 460-66 & n.51 (11th ed. 1960), *citing* 10 William S. Holdsworth, *History of English Law* 415 n.10 (7th ed. 1956).

[16] Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 160-61 & n.65 (1969); Lawrence M. Friedman, *A History of American Law* 127 n.41 (2d ed. 1985); Evan Haynes, *The Selection and Tenure of Judges* 108 (1944).

[17] *See* Daniel J. Meador, *American Courts* 91-97 (1991); National Center for State Courts, Conference of State Court Administrators, *State Court Organization* (1987); *see also* American Bar Ass'n, *Standards Relating to Court Organization* § 1.13 ("judges of each level of the appellate court system should serve therein on the basis of a permanent appointment or for a substantial term of years").

by trial *de novo* on appeal to a court of record. *See, e.g., People v. Horan, supra.* Even so, a number of state appellate courts have invalidated arrangements under which lower court judges served at the pleasure of an elective official or body.[18]

c. Even where not constrained by Article III, Congress also has overwhelmingly favored fixed terms rather than at-pleasure judicial appointments. Under the Northwest Ordinance, which Congress ratified after the Constitution took effect, 1 Stat. 51 n.(a), the commissions of the three judges of the territorial court were "to continue in force during good behavior." Over time, the territorial model changed to appointments for terms of years. Presidents could and did remove territorial judges, *e.g., McAllister v. United States*, 141 U.S. 174, 185 (1891),[19] but the

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[18] *E.g., Winter v. Coor*, 695 P.2d 1094, 1102 (Ariz. 1985) (*en banc*) ("any term shorter than two years would compromise judicial independence and would not be constitutional"; applying state constitution); *Municipal Court of Seattle ex rel. Tuberg v. Beighle*, 638 P.2d 1225 (Wash. 1982) (*en banc*) (invalidating summary removal of *pro tem* judges); *State ex rel. Morales v. City Comm'n of Helena*, 570 P.2d 887 (Mont. 1977) (invalidating city commission's power to terminate at-will police judge's appointment). In *Summers v. Thompson, supra*, the Tennessee court avoided ruling on the state constitutional validity of local authorities' summary termination of a city court judge only by narrowly construing the court's jurisdiction. In a powerful concurrence, Justice Drowota noted that "[t]he issues in th[e] case involve one of the most fundamental principles of American constitutional government, an independent judiciary." 764 S.W.2d at 188. The legislature soon amended the statute to require eight-year terms of office. 2B Tenn. Code Ann. § 6-21-501(c)(1) (Supp. 1991).

[19] Justice Field, dissenting with Justices Gray and Brown, wrote:

> The idea essentially appertaining to and involved in the judicial office is that its exercise must be free from restraint, without apprehension of removal or suspension or other punishment for the honest and fearless discharge of its functions within the sphere of the

judges were at least afforded fixed terms. Territorial judges are now appointed for fixed terms subject only to removal by the President for cause.[20] In terms of the potential chilling effect on judicial independence, there is a substantial difference between a judge who serves under those conditions and one who serves without even a nominal term. The difficulty of securing presidential assent to a removal and the danger of adverse publicity and political fallout from such an act serve as checks on the exercise of the removal power. These safeguards do not exist when removal is effected by facially routine, low-visibility military personnel actions such as orders to a new duty assignment.[21]

> jurisdiction assigned to it. No one, in my judgment, under our system of law, can be appointed a judge of a court of record having jurisdiction of civil and criminal cases, to hold the office at the pleasure and will of another. No such doctrine has been maintained in England since the [Act of Settlement], "for the further limitation of the crown and better securing of the rights and liberties of the subject," passed in 1700, one of the great Acts which followed the revolution of 1688. 141 U.S. at 193-94.

The power to control judicial tenure "exerted a most baleful influence upon the administration of justice, destructive of private rights and subversive of the liberties of the subject." *Id.*; *cf.* William H. Rehnquist, *Why a Bill of Rights is Not Enough*, 15 Wilson Q. 111, 113 (1992) (noting power of French Convention to add and remove judges at pleasure; "[i]t would be difficult to imagine a formula more certain to produce despotism").

[20] Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853, 878 n.138 (1990); 48 U.S.C. §§ 1424b(a) (1988) (D. Guam), 1614(a) (D.V.I.), 1694(b) (D.N.M.I.).

[21] This aspect of the lack of fixed terms is aggravated by the fact that military trial and intermediate appellate judges are appointed by the Judge Advocate General rather than (as the Appointments Clause

d. The connection between fixed terms and judicial independence is also reflected in international norms. The *Basic Principles on the Independence of the Judiciary* adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and later endorsed by General Assembly provide that "[t]erms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law." "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age, or the expiry of their term of office, where such exists."[22]

4. The Court of Military Appeals invoked other procedural safeguards as a substitute for fixed terms. App. 34a-35a. These protections are illusory and not an efficacious substitute for fixed terms. They did not protect petitioner's right to an independent bench at trial and on appeal. Certiorari should be granted to determine whether substitute safeguards are even relevant, and, if so, whether those cited by the court below justify its refusal to require fixed terms.

a. In the military justice system, transfer from judicial duties is the functional equivalent of removal. The removal power renders the removable official subservient to the holder of the power. *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986). "The implicit and omnipresent threat that a . . . judge can be removed immediately without cause

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requires) by the President alone, the courts of law, or the heads of departments. U.S. Const. art. II, § 2, cl. 2; *see generally Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631 (1991). The constitutionality of the military's judicial appointment practices was sustained in *United States v. Weiss*, No. 67,869/MC (C.M.A. Dec. 21, 1992) (3-2 decision).

[22] The Principles are reproduced in Centre for the Independence of Judges and Lawyers Bull. Nos. 25-26, 14-21 (Apr.-Oct. 1990).

hangs like a sword of Damocles above his bench as he rules on cases." *People v. Horan, supra*, 556 P.2d at 1221 (Carrigan, J., dissenting). Such a sword hangs over the heads of military judges in every case. The present system does not adequately insulate them from potential pressure.[23] Substantial proportions of those involved in the administration of military justice believe that guaranteed terms would create a more independent and fairer military judiciary.[24]

b. The court below claimed that "decisions of this [c]ourt, *including today's*, . . . prohibit adverse removal action" on the basis of dissatisfaction with a judge's judicial actions. App. 40a (emphasis added). The implication that prior decisions so held is false. Neither of the cases the court cited stands for the quoted proposition. Indeed, in *In re Taylor*, 12 C.M.A. 427, 31 C.M.R. 13 (1961), the court declined to entertain a request by a "law officer," *see* note 7 *supra*, for review of a decision to remove his certification. *See also In re Taylor*, 13 M.J. 204 (C.M.A. 1982) (mem.) (same). The leading treatise on military justice correctly reported in 1991 that "it is by no means clear that a judge could not lawfully be reassigned out of the judiciary because

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[23] A growing list of cases has highlighted the vulnerability of the military bench to undue and improper influence. *E.g., United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991); *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991), *cert. denied*, 112 S.Ct. 1473 (1992); *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988); *see generally* Joseph H. Baum & Kevin J. Barry, *United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence*, 36 Fed. B. News & J. 242 (1989); *see also United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976).

[24] 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory Commission Report* 406 (45% of convening authorities), 505 (50% of staff judge advocates), 618 (56% of military judges), 737 (47% of Court of Military Review judges), 836 (60% of trial counsel (prosecutors)), 951 (78% of defense counsel) (1984).

of dissatisfaction with his or her results." 1 Francis A. Gilligan & Fredric I. Lederer, *supra*, § 14-80.00, at 555. Thus, whatever the effect of the alternative protections referred to in the decision below, there was, at the time *this* case was tried, no authority for the proposition that retaliatory transfers were illegal. Nothing protected the judges who presided at petitioner's trial and Court of Military Review appeal from the chilling effect of their lack of fixed terms and exposure to reassignment out of the judiciary. The Court of Military Appeals admitted that it was announcing a new rule in petitioner's case. App. 38a. However inadequate that rule is, *see* pp. 20-21 *infra*, he is at least entitled to its benefit. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

c. The court claimed that its conclusion was confirmed by the enactment of Article 6a of the Code, 10 U.S.C.A. § 806a (West Supp. 1992), App. 40a; *see also* App. 38a, but that provision, too, was no help to petitioner because it was enacted months *after* his trial. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1303, 103 Stat. 1576. What is more, Article 6a has nothing to do with the power to reassign. Rather, it deals with "the investigation and disposition of charges, allegations, or information pertaining to the fitness of a military judge or military appellate judge to perform the duties of the judge's position." Congress put such a structure into place so that the Court of Military Appeals would not have to make up the rules as it goes along, as it did in *Carlucci, supra*. But nothing in this recent measure addresses the concern underlying the case at bar. The armed services retain the power to reassign military judges, and may do so in preference to going through the procedures for suspension or decertification for cause. Neither Article 6a nor its implementing regulations confers on the judge the right to demand a hearing on the theory that a transfer was retaliatory.

d. Even if, at the time of petitioner's trial and intermediate appeal, the law had been as the Court of Military Appeals has now declared it to be, the alternative remedies it has cited would not excuse the lack of fixed terms. Article 98(1) of the Code, 10 U.S.C. § 898(1) (1988), makes it a crime to "knowingly and intentionally fail[] to enforce or comply with any provision of [the Code] regulating the proceedings before, during, or after trial." This affords no protection against the chilling effect of a lack of fixed terms. It has been aptly described as a "dead letter." Homer E. Moyer, Jr., *Justice and the Military, supra*, § 3-361, at 780. In nearly 40 years, there have been, at most, two prosecutions under it.[25] "In theory, persons who violate the article 37 proscriptions against command influence may be prosecuted under article 98; in practice, that notion is ludicrous." *Moyer, supra*, at 779.

e. The alternative remedies are also no answer to petitioner's claim because they rely on the military judge (who may well not wish to "rock the boat") to lodge a complaint if he or she is subjected to a transfer from judicial duties. *See id.* at 780 (noting futility of expecting command influence victim to prefer charges). The judge will typically have no evidence that the transfer was retaliatory, yet the burden would be on him to prove retaliation. Hard evidence will rarely if ever be available, much less will there be proof that the action was done knowingly and intentionally, as Article 98(1) requires. "Smoking guns" are unlikely to appear where transfers can easily be palmed off as routine or dictated by the "needs of the service." Whether relief is sought under Article 138, 10 U.S.C. § 938

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[25] *Compare id.* (one case, in 1953) *and* 1 Jonathan Lurie, *Arming Military Justice: The Origins on the United States Court of Military Appeals, 1775-1950* 199 (1992) (same), *with* 1 Francis A. Gilligan & Fredric I. Lederer, *supra*, § 17-43.00, at 639 (two cases, neither of which resulted in a sentence serious enough to occasion a reported decision).

(1988), or by application to the Board for Correction of Military (or Naval) Records, 10 U.S.C.A. § 1552 (West Supp. 1992), the judge will have no right to discovery. Worse yet, Article 138 complaints and record-correction proceedings are conducted out of the public eye. The consequence is that a matter directly affecting an accused's right to an independent judge would almost certainly be conducted, from start to finish, without the accused's ever learning of it.

The Court of Military Appeals' alternative suggestion that, if all else fails, a judge who is threatened with a retaliatory transfer may seek an extraordinary writ, App. 34a-35a, is no more comforting to an accused. Passing over the substantial question as to whether such a writ would be in aid of the court's jurisdiction, as required by the All Writs Act, 28 U.S.C. § 1651(a) (1988), the judge would have to file within 20 days of learning of the action complained of, C.M.A.R. 19(d), and would still have no right to discovery. Obviously, filing an extraordinary writ against one's military superior would be public, but that very circumstance suggests that only the most courageous military judge would invoke this remedy.

f. In addition to being unrealistic, these alternative remedies are unworkable because they rely on after-the-fact developments. If, by some miracle, a judge *were* able to prove that a retaliatory transfer had occurred, a mare's nest of problems would ensue in trying to determine which prior cases might have been infected. This difficulty is further complicated because the chilling effect of a retaliatory transfer might well be felt not only by *that* judge, but by *other* judges who learn of it. Which of the cases *they* presided over would have to be set aside? Ultimately, the problem is not so much the judge who has been transferred, but the judge who *fears* transfer.

The decision below is cold comfort to military accuseds, such as petitioner, who are entitled to have their

due process rights rest on a firmer foundation than the varying personal confidence levels of career-officer judges that a rule announced by the Court of Military Appeals will in fact be observed even if there are no effective procedures for detecting or proving violations and no viable sanctions even if there were. *Tumey, supra*, 273 U.S. at 532; *see also Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 177 (1951) (Douglas, J., concurring).

Because a proper analysis shows that fixed terms are required under *Medina* (as under *Mathews*), the only remaining question is whether something inherent in military justice precludes application of the normal rules for due process. As we explain in Point III, the Court of Military Appeals was unable to point to any such special circumstances.

III

FIXED TERMS OF OFFICE ARE NOT PRECLUDED BY UNIQUE NEEDS OF THE MILITARY AND DO NOT ENTAIL SIGNIFICANT FISCAL OR ADMINISTRATIVE BURDENS.

The unique needs of the armed forces must be considered when determining how the Constitution applies to military personnel. *E.g., Goldman v. Weinberger,* 475 U.S. 503 (1986); *Brown v. Glines*, 444 U.S. 348 (1980). No such needs preclude fixed terms of judicial office. Moreover, the unique circumstances of the military argue for, rather than against, the relief petitioner seeks because the military personnel structure--including those who perform judicial duties--is pervasively hierarchical. Deference to superiors is integral to the military way of life. This renders it *more*, rather than *less*, urgent that uniformed judges have the protection of fixed terms.

1. The Navy never argued that fixed terms would be a burden. Its only justification for failing to provide fixed terms was that courts-martial are ephemeral, *i.e.*, a new court-martial must be appointed for each case. This claim--reminiscent of the mythical Scottish village in *Brigadoon*, which came to life only at long intervals--obviously overlooks the Courts of Military Review, which are standing bodies. Moreover, the argument is completely unrealistic as to the trial courts because the Navy maintains a standing trial judiciary with geographically-defined circuits, rules of court, docketing systems, and a constant flow of cases. The Court of Military Appeals chose not to dignify the Navy's theory by addressing it in the opinion.

2. The Court of Military Appeals made no effort to defend the lack of fixed terms on practical grounds, and could point to no unique military needs that preclude fixed terms. In the circumstances, it is inappropriate for this Court to rummage for reasons not to do what due process would otherwise dictate. The factors that have been looked to in the past when seeking to justify departures from civilian norms[26] in no way detract from petitioner's position. These factors include "overriding demands of discipline and duty," *Burns v. Wilson*, 346 U.S. 137, 140 (1953), readiness, *Curry v. Secretary of the Army*, 595 F.2d 873, 877 (D.C. Cir. 1979), morale and "orderly processes." *Toth*, 350 U.S. at 22. While generally not included on these lists, cost has been considered a pertinent factor in due process analysis, although the cases recognize that achieving due process may cost money.

3. Readiness and flexibility would be unaffected by the introduction of fixed terms. Only a small fraction of

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[26] The burden is on the government to justify such variations. *E.g.*, *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979); *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976).

active duty judge advocates serve in judicial billets,[27] and many of them surely serve normal tours of duty. As a result, elevating normal tours into fixed terms would have no appreciable impact on personnel management flexibility.[28] Due process would not be offended if exceptions were made for times of war or insurrection, *see Généreux*, [1992] 1 S.C.R. at 313, App. 115a, mobilization, demobilization, and reductions in statutory authorized strength. This is in keeping with both the Court's willingness to acknowledge the role of military operational requirements, *e.g., Louisiana ex rel. Handlin v. Wickliffe, supra*, and its commitment to careful scrutiny of operational necessity claims to ensure that they do not exceed or outlive their basis in fact. *E.g., Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

4. The interest in "orderly processes" is served by fixed terms which reduce uncertainty about personnel transfers. The military is expert at establishing systems; given its size and complexity, it has to be. There can be little doubt that the armed services would quickly make the arrangements needed to implement fixed terms. At that point, new "orderly processes" would be in place, and this particular consideration would drop out of the due process equation.

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[27] The general court-martial and Court of Military Review benches account for less than 3% of the total legal strength of the armed services.

[28] Deposition of Lt. Col. Edward R. Alves, USMC (ret), Head, Legal Support Branch, Judge Advocate Div., U.S. Marine Corps, at 49-50, 60 (no substantial harm to military if a right to a three-year term for judges were found to exist; four-year terms would also not create a substantial problem), *Bozin v. Secretary of the Navy*, 657 F. Supp. 1463 (D.D.C. 1987); *see also* 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory Commission Report* 1153 (1984) (letter from Lt. Col. Alves to Col. Thomas L. Hemingway, May 24, 1984) (three-year term sufficiently flexible for proper personnel management).

5. Procedural safeguards must be afforded "if that may be done without prohibitive cost," *Goss v. Lopez*, 419 U.S. 565, 580 (1975), although "it is doubtful that cost alone can ever excuse the failure to provide adequate process." *Propert v. District of Columbia*, 948 F.2d 1327, 1335 (D.C. Cir. 1991), *citing Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972). Here, cost weighs in favor of petitioner's argument since fixed terms would, if anything, entail less frequent transfers. Of course, to the extent that the services already keep their judges in place for normal tours of duty, cost drops out as a factor.

6. Long before this case, the Navy was willing to accept two-year terms of office for general court-martial and Court of Military Review judges. Thus, in response to a proposal by the Association of the Bar of the City of New York (one of the numerous *amici* below),[29] the Department of Defense's Joint Service Committee on Military Justice supported a two-year term for Court of Military Review judges, but divided over the terms of office for trial judges. The Army favored "limited tenure after a probationary period, with provision for releasing an officer from judicial duties due to abolition of his position, or at his request, or upon his appointment as appellate judge." The Navy was willing to accept terms not to exceed two years. This seriously undermines any contention that the protection petitioner seeks would represent a substantial, much less an intolerable burden on the service.

7. Nations that share our legal traditions, as well as those that do not, have found it workable to afford military judges the protection of fixed terms. Thus, Canada, another federal union with common law traditions, recently ad-

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[29] Ass'n of the Bar of the City of New York, Comm. on Military Justice and Military Affairs, *A Bill to Improve the Military Justice System* (1977), *discussed in* Eugene R. Fidell, *Judicial Tenure Under the Uniform Code of Military Justice*, 31 Fed. B. News & J. 327, 331 (1984).

dressed the issue presented in this petition. In *Généreux*, the Supreme Court of Canada agreed that fixed terms of office are required for court-martial judges to meet the "independent tribunal" requirement of § 11(d) of the *Canadian Charter of Rights and Freedoms*.[30] The legal traditions of the former Soviet Union are of course far removed from those of the common law countries. This makes it all the more remarkable that Soviet military judges were protected by fixed terms of office.[31] If nations with such divergent legal traditions and military postures as these can accomodate fixed terms for military judges, it is difficult to treat seriously the notion that there is anything inherent in military affairs that precludes them for this country's soldier- and sailor-judges.

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[30] Any person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The Canadian Court-Martial Appeal Court had reached the same conclusion in *R. v. Ingebrigtson*, 61 C.C.C.3d 541 (C.M.A.C. 1990). Rather than appealing, the Ministry of Defence modified the *Queen's Regulations and Orders* ("QR&O") (Canada's equivalent of the *Manual for Courts-Martial*) to provide that officers performing judicial duties shall be appointed for "a fixed term" which "shall normally be four years and shall not be less than two years." QR&O art. 4.09. Such officers performing judicial duties may be removed before the expiration of their term only for just cause, upon the officer's written application, acceptance of a promotion, or retirement. *Id.* arts. 4.09(6), 11.354(5). The *Généreux* court noted these changes with approval. App. 105a-06a, 111a.

[31] Jody M. Prescott, *Soviet Military Justice and the Challenge of Perestroika*, 123 Mil. L. Rev. 129, 131-32 (1989); Michael N. Schmitt & James E. Moody, *The Soviet Military Justice System*, 34 A.F. L. Rev. 1, 28 & n.235 (1991). With the advent of *perestroika*, the term of office was extended from five years to ten. *Id.* at 28 & n.238; Michael N. Schmitt, *The Judicial and Non-Judicial Punishment Systems of the Soviet Armed Forces*, 4 J. Sov. Mil. Studies 87, 102 & n.50 (1991).

In summary, on one side of the scale is petitioner's compelling interest in being tried before an independent judge before being sent to prison and subjected to the lifetime stigma of a punitive discharge. On the other side, so far as can be determined from the decision below, there is nothing. Fixed terms of judicial office are specially needed in the military justice system. Without imposing significant administrative burdens, they would substantially bolster judicial independence and public confidence in this important system of criminal justice. Due process mandates this protection.

Conclusion

For the foregoing reasons, certiorari should be granted.

Respectfully submitted.

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ADDENDUM

Article 6(a) of the Code, 10 U.S.C. § 806(a) (1988), provides:

> The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps.

Articles 26(a) and (c), 10 U.S.C. §§ 826(a), (c) (1988), provide:

> (a) A military judge shall be detailed to each general court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial.
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> * * *
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> (c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). . . . A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform

duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of the Judge Advocate General or his designee.

Article 66(a), 10 U.S.C. § 866(a) (1988), provides:

> Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. . . . The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.